

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 06-0037
Sales and Use Tax
For The Tax Period 2001-2003**

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Issues

I. Sales and Use Tax -Imposition of Sales Tax

Authority: IC § 6-2.5-2-1(a), IC § 6-2.5-1-2, IC § 6-8.1-5-1(b), IC § 6-8.1-5-4;. IC § 6-2.5-1-1; IC § 6-2.5-4-1(b).
The taxpayer protests the imposition of sales tax.

II. Tax Administration- Ten Percent Negligence Penalty

Authority: IC § 6-8.1-10-2.1, 45 IAC 15-11-2 (b)(c).

The taxpayer protests the imposition of the ten percent negligence penalty.

III. Tax Administration- Interest

Authority: IC § 6-8.1-10-1(e).

The taxpayer protests the imposition of interest.

Statement of Facts

The taxpayer was a corporation that primarily offered advertising and marketing services. The taxpayer also sold products such as business cards, brochures, banners, and letterhead stationery. Pursuant to an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales and use taxes, penalty, and interest against the taxpayer. The taxpayer protested a portion of the assessment of sales tax, penalty, and interest. A hearing was held and this Letter of Findings results.

I. Sales and Use Tax -Imposition of Sales Tax

Discussion

The taxpayer was primarily engaged in the provision of marketing and advertising services. She paid sales tax on the property she used in the provision of these services. Sometimes she took orders for brochures, business cards, banners, and other similar items. In those instances, the taxpayer designed the product and outsourced the actual production of the product. She paid sales tax on the actual printing of the items. She passed the sales tax she paid on to her customers. She did not remit the collected sales tax to the state. The department assessed sales tax on the unremitted sales tax and the service portion of the product as a unitary transaction subject to the imposition of the sales tax. The taxpayer protested this assessment on two bases. First, she protested that she had actually paid the sales at the time of her purchase of the outsourced materials and merely reimbursed herself with her charge to her customers. Secondly, she protested the assessment of sales tax on the service portion of the product.

Pursuant to IC § 6-2.5-2-1(a), Indiana imposes a sales tax on all retail transactions made in Indiana. IC § 6-2.5-4-1(b) defines a retail transaction as the acquisition of tangible personal property by a retail merchant for the purpose of resale and subsequent transfer of that property to another for consideration. A retail transaction is defined as selling at retail. The retail merchant collects the tax and remits it to the state. Id.

Service transactions generally are not subject to the sales/use tax since they do not involve transfers of tangible personal property. The Legislature has enacted statutes to tax otherwise nontaxable services, by defining services such as furnishing accommodations as retail transactions. A unitary transaction is any transaction that includes “all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated.” IC § 6-2.5-1-1. A retail unitary transaction is when a retail merchant purchases tangible personal property in his ordinary course of business and sells that property along with services as a unitary transaction. IC § 6-2.5-1-2. Sales tax is imposed on the total cost of a unitary transaction.

In the taxpayer’s situation, she sold a product (i.e. business cards, brochures, banners, and letterhead stationery) that intrinsically combined service and tangible personal property. Taxpayer’s customers did not bargain for or order the services separate from the tangible personal property. The customers ordered the final combined product and expected delivery of the combined product. The taxpayer’s sale of items such as brochures and business cards is a unitary transaction subject to the imposition of the sales tax.

The taxpayer failed to remit the sales tax collected on the personal property in the unitary transaction and failed to collect and remit sales tax on the service portion of the unitary transaction.

Finding

The taxpayer’s protest is denied.

II. Tax Administration- Ten Percent Negligence Penalty

Discussion

The taxpayer protests the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at 45 IAC 15-11-2 (c) as follows:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

The taxpayer provided substantial documentation to indicate that its failure to pay the assessed use tax was due to reasonable cause rather than negligence.

Finding

The taxpayer's protest is sustained.

III. Tax Administration- Interest

Discussion

The department added interest on the tax liabilities assessed pursuant to the audit. The taxpayer protested this imposition of interest.

The department does not have the authority to waive interest. IC § 6-8.1-10-1(e).

Finding

The taxpayer's protest is denied.

KMA/JMM/DK/06/05/07